APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 297
September Term, 2006
(No. 812, Sept. Term, 2005 Court of Special Appeals)

MARYLAND RECLAMATION, LLC,

v.

RAMBLEWOOD HOMEOWNER'S ASSOCIATION, *et al.*

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: October 18, 2006

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 297
September Term, 2006
(No. 812, Sept. Term, 2005 Court of Special Appeals)

MARYLAND RECLAMATION, LLC,

v.

RAMBLEWOOD HOMEOWNER'S ASSOCIATION, *et al.*

ORDER

The Court having considered the motion for reconsideration filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, denied.

/s/ Robert M. Bell
Chief Judge

DATE: December 15, 2006

APPENDIX C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

[Filed June 22, 2006]

No. 0812
September Term, 2005

RAMBLEWOOD HOMEOWNERS ASSOCIATION, *et al.*,

v.

MARYLAND RECLAMATION, LLC

Adkins, Krauser, Rodowsky, Lawrence F., (Retired, Specially Assigned) *JJ.*

Opinion by Adkins, *J.*

This is another case involving split zoning decisions concerning a rubble fill—one of life's "necessary evils" that no one wants in their own backyard. Appellee Maryland Reclamation, LLC, applied for a special exception to convert a nearly depleted sand and gravel mine to a disposal area for construction-related waste. The site is in Upper Marlboro, next to three residential subdivisions with 600 households, which are represented in this litigation by neighborhood associations.[1] It is also just one and a half miles from another rubble fill that was granted a special exception while this application was pending.

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[1] We shall refer to the appellants representing the Ramblewood, Oak Grove, and Robshire Acres neighborhood associations collectively as "the Homeowners."

Aligned with Maryland Reclamation on the side of at least partial approval with conditions are the Maryland-National Capital Park & Planning Commission (M-NCPPC), the Prince George's County Planning Board (the Planning Board), and the county's Chief Zoning Hearing Examiner (the ZHE). In favor of denying the application are appellees, the Homeowners and the Prince George's County District Council (the Council), which concluded that (1) Maryland Reclamation did not prove this rubble fill is necessary, to serve, projected growth, within the meaning of the County zoning code and (2) the rubble fill will have disproportionately adverse impacts on its residential neighbors. On judicial review, the Circuit Court for Prince George's County remanded to the District Council on both "necessity" and "adverse effects" grounds. We shall reverse and remand to the circuit court for entry of an order affirming the District Council.

FACTS AND LEGAL PROCEEDINGS

The Property And Proposed Use

The proposed site has been in use as a surface sand and gravel mine since the 1960s. After portions of it were used as an illegal rubble fill, the property was reclassified to add Class III landfill uses.

The property consists of two R-R zoned parcels totaling 131.5 acres, divided by the County's access road to an adjacent sanitary landfill. The smaller eastern parcel (42.91 acres) borders the Ramblewood residential neighborhood. That parcel and the bisecting access road are near the Oak Grove neighborhood. The larger western parcel (88.59 acres) borders Brown Station Road, on the other side of which is the Robshire Acres subdivision, where some of the homes are located within 100-150 feet. There are three schools located in the vicinity.

According to the District Council,

> [t]he proposed fill area lies immediately east of (and across the street from) the Robshire Acres residential

subdivision and a short distance west of the Ramblewood and Oak Grove subdivisions, whose residents can see and hear operations on the subject property. Other land-intensive uses—mining and fill operations on the subject property, another rubble fill (Ritchie, the S.E. 4408 case) a mile away, an electric power substation immediately to the south, and the adjoining Brown Station Landfill, also to the south—affect the residential properties in Ramblewood, Oak Grove, and Robshire Acres.

Administrative Zoning Review Of The Application

Maryland Reclamation proposes to convert the property from its current use to a rubble fill that can accommodate 300 loads per day, with an associated 600 truck trips per day, for a period of 20 years. In April 1999, the company filed an application for a special exception, which we will refer to as S.E. 4347.

Under Prince George's County Zoning Ordinance section 27-406(k), "[a] sanitary landfill or rubble fills may be permitted as a temporary Special Exception," but only if the District Council finds that ""the proposed use is necessary to serve the projected growth in Prince George's County[.]" Moreover, under section 27-317, another prerequisite for a special exception is proof that "[t]he proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area[.]" We shall refer to these two requirements respectively as the "adverse effects" and "necessity" conditions.

Before S.E. 4347 was considered by the District Council, it traveled through various zoning and planning authorities, on a long but relatively straight path. We summarize the highlights chronologically as follows:

- February 2000. The M-NCPPC's Project Study Team for S.E. 4347 issued its report analyzing "rubble landfills capacity in Prince George's County, Md. (1999-

2014)." This report (and a later update) concluded that there is a need for rubble fill capacity to serve both Prince George's County and other jurisdictions.

- February 25, 2000. After reviewing that study, as well as reports from the Maryland Departments of the Environment, Natural Resources, and Transportation; various Prince George's County agencies (i.e., Fire/ EMS Department, Department of Public Works and Transportation); and several of its own divisions (i.e., Community Planning, Natural Resources, Permit Review, Public Facilities Subdivision, Transportation, and Urban Design Review, the M-NCPPC issued its Technical Staff Report on S.E. 4347. The M-NCPPC recommended approval with conditions.
- July 20, 2000. The Planning Board recommended approval with conditions.
- March 29, 2002. The Chief Zoning Hearing Examiner approved S.E. 4347 for' the larger west mound only, with certain conditions that are not at issue in this appeal.

District Council Denial

After extensive hearings, at which neighbors and other opponents of S.E. 4347 presented evidence, the District Council denied the requested special exception. In its September 24, 2003 findings of fact and conclusions of law, the District Council noted that, at the time the Technical Staff of the M-NCPPC and the Planning Board reviewed S.E. 4347, the District Council had not approved the nearby Ritchie rubble fill (S.E. 4408).

The District Council cited two independent grounds for its decision. First, the District Council found that Maryland Reclamation, "even with staff and Planning Board assistance, did not prove that the proposed rubble fill is 'necessary' to

'serve' the County's 'projected growth,' within the meaning of § 27-406(h) of the Zoning Ordinance" As the District Council interpreted and applied the necessity condition, in order "[t]o make these proofs, a rubble fill applicant must show what the projected County growth in the next 15 years will be, how the proposed facility will 'serve' that projected growth, and how the facility is 'necessary' to serve that growth." "If projected County growth will not be affected by the presence or absence of the proposed facility, then it cannot be said, for purposes of § 27-406(h), that the facility is 'necessary' to serve that growth." According to the District Council, this "lack of necessity" is "the main reason [it] must deny this application[.]"

The District Council also concluded that "an additional reason to deny to the application" is that Maryland Reclamation "did not prove . . . that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations in the R-R Zone." These adverse effects in the form of noise, odors, dust, visual effects, traffic safety and congestion are "[t]he chief reasons for neighborhood opposition to the application[.]" The District Council stated:

> The record reflects, first, that the residential communities along Brown Station Road have been visited with more than their fair and reasonable share of mining, and landfill uses, "temporary" in nature, over the last 30 years or more; second, that noise, odors, and visual effects from existing, and past mining, landfill, and other resource recovery and solid waste disposal activities in the neighborhood, as well as from the power lines traversing the neighborhood and the constant truck traffic along Brown Station Road, have been continuing problems for the residents for many years; and third, that neighborhood opposition witnesses showed by. Substantial evidence that the proposed rubble fill operations will

increase for years the adverse noise, odors, visual, and traffic safety effects now present in the neighborhood from existing landfill and other operations. . . .

The District Council . . . concludes, as argued by opposition residents, particularly those in Ramblewood and Robshire Acres communities, that the applicant did not prove, as is required by § 27-317 of the Zoning Ordinance, that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations within the R-R Zone. This proposed S.E. 4347 site, is much closer to established residential subdivisions than other R-R sites, including the S.E. 4408 site recently approved by the District Council. Visual, noise, and odor effects from a rubble fill at the subject location will be much greater than would be anticipated at the S.E. 4408 property and other R-R zone locations. (Emphasis added.)

Judicial Review and Remand

Maryland Reclamation petitioned for judicial review of the District Court's decision. After a hearing, the Circuit Court for Prince George's County remanded the matter back to the District Council "for oral argument . . . solely on the issue of necessity under § 27-406(h)[.]" The court concluded that the District Council's interpretation of "necessity" was either incorrect or needed further explanation.

On November 18, 2004, the District Council reaffirmed its denial, supplementing its prior order denying S.E. 4347.

The Examiner concluded that the terms "necessary to serve the projected growth" required only an analysis of "accommodation." But the Examiner's reading of § 27-406(h) essentially nullifies its requirements: a rubble fill applicant will always be able to show that its proposed operation affords some convenience and accommodation to the public, and neither staff nor opposition would be

> able to prove otherwise. . . To satisfy § 27-406(h), an applicant must prove much more than public convenience and accommodation.

The Council emphasized that it

> has determined in this and in two prior rubble fill cases, S.E. 4355 (Brandywine) and S.E. 4408 (Ritchie Reclamation), that . . . . [t]o prove what is called for in § 27-406(h), a rubble fill applicant must address by evidence these three questions:
>
> (1) What will the projected growth in Prince George's County be, during the period of operation of your rubble fill?
>
> (2) How will, your rubble fill operation serve that projected growth?
>
> (3) Why should the District Council conclude that your fill operation will be necessary to serve the projected growth?

Applying this analytical template, the District Council explained why Maryland Reclamation's "proofs are insufficient[.]" Specifically, the Council concluded that Maryland Reclamation failed to show "how the absence of its fill operation will affect growth." The District Council reiterated its "firm belie[f]" that "a rubble fill application should not be approved unless the record shows some likely adverse effects on projected County growth without the proposed operation." Because Maryland Reclamation "did not prove that its operations would have any effects on projected County growth," "the District Council was required to deny the S.E. 4347 application."

The circuit court reviewed the District Council's supplemental order. The court held, "for the second time," that the District Council's interpretation of section 27-406(h) "largely ignored the remand," and 'remained erroneous. Since the

earlier remand, the court noted, "another *nisi prius* judge of this county and three appellate judges (in an unreported opinion in another case) agreed that the clear and plain meaning of the ordinance did not support the District Council's interpretation."

But the circuit court did not reverse the District Council "outright" because it "was persuaded by the argument of counsel for the opposition homeowners" that

> [t]here may be some merit to counsel's suggestion that the record showed the recent approval of another rubble fill approximately' 1½ miles away and an increase of heavy truck traffic different from that which would be generated from any other [site]. Although the District Council made a passing reference to these matters it provided no meaningful discussion of them in its resolution for the court to review. Judicial review of an administrative agency at this level is not appellate review. It is a review only of meaningful findings and conclusions of the administrative body and does not call for reviewing the transcript of the proceedings.

The court remanded to the District Council for reconsideration of the necessity issue, using the correct legal standard. As a result of a motion to alter or amend that order filed by Maryland Reclamation, the court explained that evidentiary proceedings before the District Council would be limited to the necessity issue, but that the Council was not prevented from "making specific findings of fact" on the "adverse effects" issue as well.

Appeal

The District Council and the Homeowners appeal the circuit court's decision, raising three issues that we rephrase as follows:

I. Did the District Council erroneously interpret the "necessity" requirement in section 27-406 of the

county zoning ordinance to mean that the applicant must prove that failure to grant the special exception would adversely impact the county's projected growth?

II. Was the District Council's denial of the special exception arbitrary and capricious because Maryland Reclamation showed "necessity" within the meaning of section 27-406?

III. Did the District Council err in concluding that the rubble fill would cause adverse effects greater than could be anticipated at other locations within the R-R zone?

We find the last issue dispositive, and therefore do not address the first two. We shall hold that there were sufficient findings of fact with respect to disproportionately adverse effects, and that there was substantial evidence to support those findings.

DISCUSSION

Standards For Judicial Review Of Denial Of A Special Exception

In reviewing 'the decision of an administrative agency, "we reevaluate the decision of the agency, not the decision of the lower court." The scope of our review of administrative agency action is narrow and we are "not to substitute [our] judgment for the expertise of those persons who constitute the administrative agency." Accordingly, this Court is tasked with "'determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'"

With regard to questions of fact, we will only disturb the decision of an administrative agency if "a reasoning

> mind reasonably could [not] have reached the factual conclusion the agency reached." Thus, "[a] reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record."

Days Cove Reclamation Co. v. Queen Anne's County, 146 Md. App. 469, 484-85, *cert. denied*, 372 Md. 431 (2002) (citations omitted).

Adverse Effects

> In *Schultz [v. Pritts*, 291 Md. 1 (1981)), the Court of Appeals explained that conditional uses result from the legislative determination that the use is "compatible with the permitted uses in a use district, but that the beneficial purposes [that conditional] uses serve do not outweigh their possible adverse effect." *Id.* at 21. The adverse effect referred to is "at the particular location proposed" and is "above and beyond that ordinarily associated with" the particular conditional use. *Id.* at 22. Thus, the Court held that "the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone."
>
> *Id.* at 22-23. The conditional use provisions of a county zoning code must be read with the holding of *Schultz* engrafted upon them. *See Mossburg v. Montgomery, County*, 107 Md. App. 1, 21 (1995), *cert. denied*, 341 Md. 649 (1996).

Days Cove Reclamation Co., 146 Md. App. at 474-75.

Although the impact of a proposed rubble fill on a unique characteristic of neighboring property is relevant,

> the *Schultz* requirement is not satisfied simply by identifying some unique characteristic of the neighborhood. In order for a unique characteristic of the neighborhood to support the denial of a conditional use it is necessary that the ordinary adverse effects of the conditional use be greater at the location in question, because of the unique characteristics of that location's neighborhood, than would be the case if the use were located elsewhere in the zone.

Id. at 487 (emphasis added).

Among the "adverse effects" that rubble fills may have on neighboring properties are visual, traffic, and property devaluation impacts that inevitably accompany many "LULUs" (*i.e.*, locally undesirable land uses). *See id.* at 485-86. When there is substantial evidence that these adverse effects will be harsher, in kind or degree, than they would be if the same rubble fill were to be located elsewhere within the same zone, these adverse effects may justify denial of a special exception for a rubble fill. *See id.*

This burden of proof can be met with evidence that the proposed rubble fill site will impose inherently adverse effects on neighboring residences, with greater intensity, frequency, and duration, because there are already other similar uses near the proposed site. Four cases illustrate the boundaries of the "cumulative effects" rationale for denying a special exception to operate a rubble fill.

In *Moseman v. County Council of Prince George's County*, 99 Md. App. 258, 266, *cert. denied*, 335 Md. 229 (1994), this Court affirmed the denial of an application for a special exception to operate a rubble fill. We held that

> what makes this site unique is the very fact that there is already an existing rubble fill across the street. The

> District Council recognized the unique problem the cumulative impact of two adjacent rubble fills would have on a single community by concluding that "given the existence of the adjoining rubble fill currently in operation, granting the proposed rubble fill would adversely impact the surrounding properties in a manner unique and different from the adverse impact which would otherwise result if a rubble fill were located elsewhere within the O-S Zone."

Id. (emphasis added).

Similarly, in *Brandywine Enters., Inc. v. County Council of Prince George's County*, 117 Md. App. 525, 537, *cert. denied*, 347 Md. 253 (1997), we also affirmed the denial of a special exception to extend the operation of a rubble fill, on the ground that "there was substantial evidence upon which the District Council could find that there would be a cumulative adverse impact from the proposed fill and from an adjacent closed fill." "[T]he location of the existing and proposed rubble fills is such that, when the rubble fills are all completed and closed, four single family residences will be surrounded on three sides by 100 foot mountains of rubble." *Id.* Road access to these residences was via a lane that was already "severely taxed by the operation of the existing fill[.]" *Id.* at 538. "Even assuming that the rubble fills will not operate simultaneously, the District Council could properly have found that the proposed fill and existing fill will have a cumulative adverse impact upon the nearby residents." *Id.* In addition to visual effects that the opponent's expert characterized as "industrial landscap[ing]," this Court recognized that

> the record supports a finding of temporally cumulative adverse impact.
>
> The Zoning Ordinance provides that a rubble fill may be permitted as a temporary special exception. § 27-

> 406(a). Yet, if the existing fill is completed as scheduled, it will have operated a total of seventeen years, and appellant's proposed fill would require an additional five years of operation. In addition to the obvious (*e.g.*, twenty-two years versus seventeen years of noise, dust, traffic and odors), two examples of such temporally cumulative impact are as follows. There was testimony that the tree canopy over Cross Road Trail, which contributes to Cross Road Trail's classification as a scenic road, has been damaged by heavy truck traffic. It is reasonable to conclude that five additional years of truck traffic would further damage the tree canopy.

Id. at 539 (bold added).

More recently, however, we held in *Day's Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. at 506, that the evidence was not sufficient to defeat a proposed rubble fill located near a closed landfill and a residential solid waste convenience center. We distinguished *Moseman* and *Brandywine* on the ground that they "involved two landfills." *Id.* at 505. In *Moseman*, we pointed out, "[i]t was 'the existence of the adjoining rubble fill currently in operation' which created the unique adverse impact[.]" *Id.* In *Brandywine*, we emphasized, it was, the "cumulative adverse impact" of having "an active landfill operation" in continuous operation near the neighboring residential properties "for twenty-two years[.]" *Id.* We contrasted such long term and multiple landfill scenarios with the "operational life of the landfill" proposed by Day's Cove, which was scheduled to be the only landfill open in' that area for a period "estimated at five to ten years." *Id.*

Another case finding insufficient "cumulative adverse effects" in the solid waste disposal context is *Mossburg v. Montgomery County*, 107 Md. App. 1 (1995), *cert. denied sub nom. Twin Lakes Citizens v. Mossburg*, 341 Md. 649 (1996). There, we reversed the denial of a special exception to

operate a solid waste transfer station in an industrial zone, because there was insufficient evidence that the proposed site, in combination with a closed landfill and incinerator, had a uniquely cumulative adverse effect on the neighborhood. *See id.*

In this appeal, the Homeowners and the District Council argue that "the facts and legal conclusions, of the District Council related to adverse impacts support a denial of the present application." They contend that there is "substantial evidence in the administrative record" to establish that the proposed rubble fill will have uniquely adverse effects on neighboring residents, due to the cumulative effects of adding this rubble fill to a neighborhood already burdened by the only sanitary landfill in the county, another rubble fill less than two miles away, and an electric substation. They contend that "[t]hese effects, especially noise and dust and odors and dump truck traffic, were shown to be substantial and serious, and would support . . . upholding the Council's denial order even if Maryland Reclamation had proved necessity by clear and convincing evidence." We agree.

As a threshold matter, we reject the circuit court's conclusion that the District Council failed to make meaningful findings of fact or conclusions of law concerning adverse effects. The District Council clearly stated that the Ramblewood and Robshire Acres communities would suffer a harsher impact than other communities near alternative R-R sites for the rubble fill. In support of its conclusion that S.E. 4247 fails the "adverse effects" requirement in Prince George's County Zoning Ordinance section 27-406, the District Council explained that "[t]he record reflects" that these residential communities are the only ones within the R-R zone that will suffer the inherent burdens of living within the adverse impact zone of, not one, but two rubble fills, not to mention a sanitary landfill and an electric substation. Furthermore, the Council pointed out that the residential

communities adjacent to the Maryland Reclamation site are the only ones for whom the supposedly "temporary" burden of living near solid waste disposal sites would be extended "for years" beyond the "30 years or more" that they already have "been visited with more than their fair and reasonable share of mining and landfill uses." In addition, the Council found that

> [t]his proposed S.E. 4247 site is much closer to established residential subdivisions than other R-R sites, including the S.E. 4408 site [*i.e.*, the Ritchie Rubble Fill] recently approved by the District Council. Visual, noise, and odor effects from a rubble fill at the subject location will be much greater than anticipated at the S.E. 4408 property and other R-R zone locations.

Taken together, these are not mere "passing references," as the circuit court characterized them. The District Council explained with specificity that it found harsher adverse impacts on these Homeowners, based on the cumulative effects of (a) increased burdens of "adverse noise, odors, visual, and traffic safety effects" caused by the nearby Ritchie rubble fill; (b) extension of solid waste disposal fill operations, and these same associated burdens, at the Maryland Reclamation site for another nine years; and (c) proximity to adjacent residential neighborhoods, which will be subjected to greater "visual, noise, and odor effects" than are neighbors of even the nearby Ritchie rubble fill. These detailed findings permit meaningful judicial review, in that they identify the factual basis for the Council's adverse effects conclusion.

Moreover, we find substantial evidence in the administrative record to support these findings. Evidence is substantial for purposes of supporting a county board's factual finding of adverse effects if it could have persuaded a reasonable person to reach the same conclusion, *i.e.*, if the factual question is "fairly debatable." *See Bd. of County Comm'rs for. Cecil County v. Holbrook*, 314 Md. 210, 218 (1988).

Maryland Reclamation itself actually provides some of best evidence that the proposed rubble fill will create uniquely adverse effects for its neighbors in Robshire Acres, Ramblewood, and Oak Grove. Admitting these effects, Maryland Reclamation justifies them on a "containment" theory. Both Maryland Reclamation's application and the testimony of its land use expert advocate approval of the proposed rubble fill as a means of preventing other communities from having to suffer them.

Indeed, the company explained in its application that

> [t]he proposed site is located in a unique area of the county where other similar type uses, such as a sanitary landfill, auto salvage yard and an electric substation and overhead transmission lines abound. Locating a rubble fill at this location, in which the proposed use will be partially encircled by the county's landfill, directly diminishes the potential for negative impact on properties in other areas of the county. (Emphasis added.)

At the hearing, Maryland Reclamation established through its environmental expert that the Brown Station sanitary landfill adjacent to the proposed rubble fill site has been in use since the 1960's, and that, throughout that time, area residents have complained of "nasty things" associated with that landfill, including odors, dust, noise, birds, and truck traffic. If the rubble fill is approved, the expert admitted, "there will be some" additional "cumulative negative impacts" "that will be visited on the residents that live within that neighborhood[.]" In his opinion, however, locating a new rubble fill in the same place would serve the greater good by prolonging and slightly increasing existing burdens on the Homeowners, so that other communities who currently do not suffer such adverse effects will not have to do so. In his words, the type of adverse effects associated with the proposed rubble fill are "already there big time" in the adjacent

subdivisions, so that adding more of them will not "really change anything in the neighborhood."

In addition to this evidence from Maryland Reclamation, the administrative record includes other evidence supporting the District Council's finding of uniquely adverse effects. For example, a report prepared by the MNCPPC dated February 25, 2000 contains evidence that Maryland Reclamation's proposed rubble fill will do greater harm to the "viewshed" of the Homeowners than it would if located elsewhere. The planning professionals acknowledged that this fill would be much closer to residential neighbors than rubble fills at other sites (such as the Ritchie Rubble Fill), because there is so little opportunity to "mitigate" through distance and landscaping:

> An issue that has been increasingly evident in the last several years is the impact a project may have on the viewshed of adjacent properties and the neighborhood in general. This has been an issue for monopoles, industrial sites and even a proposed rubble fill in a much less densely populated portion of southern Prince George's County. In order to evaluate the potential impacts that this application will have on the viewshed, the applicant arranged for a balloon to be raised to the ultimate elevation of the larger mound [i.e., the west mound]. On February 10, 2000 the applicant's representative and staff drove through several of the nearby neighborhoods to determine if the proposed rubble fill would be visible from the neighborhoods or roads in the area. Based on the information gathered on that date, it was determined that most of the residences in Robshire Acres and some residences on several streets in the Oak Grove subdivision would have a direct line of sight of the rubble fill.
>
> The amount of the ultimate rubble fill that will be visible from the various areas will range from an outline as viewed through the trees to a clear view of as much as

> 120+ feet of the rubble fill from some areas of Robshire Acres. . . . In each situation where there was a direct unobstructed view of the proposed rubble fill there was little or no potential for the applicant to provide mitigation. This is generally due to the [close] distance of the viewing locations from the site and the angle of the line of sight. The only potential for reducing the viewshed impacts would be to lower the height of the proposed mound or the planting of additional vegetation near the viewing location. This could require extensive plantings on many properties[.] (Emphasis added.)

The MNCPPC recommended approval of the rubble fill on the condition that additional, specified landscaping be planted along the boundary lines of the property. As the planners acknowledged, however, the top of the 20 foot-high berm surrounding the new rubble fill still would be "located within 200 feet" of 12 homes in the Robshire Acres subdivision, making the distance from these homes to the fill site itself only 300 feet—the distance from goal line to goal line on a football field. The District Council was entitled to conclude on the basis of this report that, notwithstanding any landscaping planted by Maryland Reclamation, the proximity and sight lines would still result in adverse visual impacts above and beyond those that could be expected if the site were located elsewhere within the R-R zone.

Similarly, there was also evidence from which the District Council could reasonably conclude that the rubble fill will present a cumulative burden for the Homeowners, because it will undoubtedly add to the noise, dust, odor, and traffic that the Homeowners , already suffer.

- According to the MNCPPC report, the new rubble fill will result in up to an additional "635 vehicles per day," for a "total of 1,270" trips to and from the site.

- A number of current residents testified about "the constant noise" and "beeping" from trucks as they arrive and back up, as well as the "clatter and clang of the metallic lift gates" as loads are dumped.
- Many residents told the District Council that the noise, along with the dust and odors associated with the continuous dumping, grading, and compacting at the sanitary landfill, and the heavy traffic along the route, already cause them to keep their windows closed and their children inside.
- Several residents and their physicians attributed respiratory and other illnesses to the dust and other adverse effects.
- These adverse effects would increase as a result of the greater number of truck trips and the longer period of fill operation.

We agree with the Homeowners and the District Council that, on this administrative record, the adverse impact question was fairly debatable. Even the evidence and arguments offered by Maryland Reclamation supported the District Council's conclusion that adverse effects from the proposed rubble fill would be greater, in kind, degree, and/or duration, than those same adverse effects would be if the rubble fill were to be located elsewhere in the R-R zone. As in *Schultz*, *Moseman*, and *Brandywine*, there is substantial evidence that the traffic, noise, dust, odor, and unsightliness associated with the proposed waste operation will be greater for the residents of Robshire Acres, Oak Grove, and Ramblewood, because these citizens currently live with similar burdens created by the Brown Station landfill, the Ritchie Rubble Fill, and the electric substation, and have been doing so for decades. Both the confluent nature and the chronological duration of these adverse effects justify the District Council's decision not to extend them.

Conclusion

There was sufficient legal and evidentiary grounds for denying S.E. 4347. The' District Council's finding of cumulative adverse effects is therefore neither arbitrary, capricious, nor erroneous. The circuit court erred in failing to affirm the Council's denial of S.E. 4347 for that reason. Consequently, we shall reverse the judgment, without addressing whether there also was error with respect to the "necessity" requirement of section 27-406.

JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR ENTRY OF AN ORDER AFFIRMING THE DISTRICT COUNCIL'S DENIAL OF S.E. 4247. COSTS TO BE PAID BY ½ BY MARYLAND RECLAMATION, ½ BY PRINCE GEORGE'S COUNTY.

APPENDIX D

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

[Filed May 4, 2005]

CAL 03-22303

MARYLAND RECLAMATION, LLC
Petitioner,

vs.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
Respondent.

OPINION AND ORDER OF COURT

This case came on for judicial review for the second time on April 29, 2005. In the first judicial review, the court on July 7, 2004 remanded the case to the District Council for it to explain its rationale for using what the court deemed to be an unwarranted interpretation of § 27-406(h) of the Prince George's County Zoning Ordinance.

That section provides that "(W)hen approving a Special Exception for a rubble fill or Class III fill, the District Council shall find that the proposed use is necessary to serve the projected growth in Prince George's County." The District Council denied the Special Exception request and said that its "main reason" for doing so was "that the applicant did not prove the proposed use is necessary to serve the County's projected growth over the next 15 year." The District Council interpreted the term "necessary" in § 27-406(h) to mean that the applicant had to prove that its rubble fill was required. Neither the Technical Staff of the Planning Commission, the Planning Commission or the County Zoning Examiner inter-

preted the ordinance that way. The ordinance requires the technical staff to include an inventory of all approved and pending rubble fills (§ 27-406(e)) and an need analysis based on growth projections over a 15 year period (§ 27-406(g)).

This court held that the ordinance does not require an applicant to demonstrate that not approving its application will in some way adversely affect the county's projected growth. The ordinance provides that the District Council, not the applicant, make this finding. In other words, the ordinance puts the applicant on notice only to provide evidence that its proposed use will alleviate some need of rubble fill deficit projected over a 15 year period.

The planners and the zoning examiner agreed that there was a county need for rubble fill space under Section 27-406(h) of the ordinance and recommended approval of the application. The subject property already had a Class III fill permit, had been used in the past as a rubble and was located between two existing rubble fills. But just because the planners and zoning examiner think so that is not to say that a proposed rubble fill is *per se* necessary to serve the projected needs of the county. That decision is left solely to the District Council.

The burden of proof on the applicant between providing evidence of rubble fill deficit and projected county growth on the one hand and providing evidence that its rubble fill is required for the county's growth on the other hand is one of degree. How an applicant can prove that without its specific fill the county's growth will be adversely affected is beyond the court's ken. It would appear to be an insurmountable burden. Counsel for the District Council suggests otherwise because the District Council has approved a rubble fill utilizing the same standard. However this argument simply begs the question. Moreover, even if the District Council should amend its ordinance to require such evidence in the future

there was never any notice to the applicant that it had to do so in this case.

Finding that its interpretation was an error of law and that this was the "main reason" for its denial, this court remanded the case to the District Council to take a second look at its interpretation.

The District Council largely ignored the remand, repeated its own interpretation of the zoning ordinance and filed a Supplemental Resolution that insisted that an applicant for a special exception landfill must affirmatively show "how the absence of its fill operation will affect growth" in Prince George's County.

This court has concluded for the second time that § 27-406(h) of the ordinance does not require that showing. In the meantime, another *nisi prius* judge of this county and three appellate judges (in an unreported opinion in another case) agreed that the clear and plain meaning of the ordinance did not support the District Council's interpretation. The District Council's intransigence reminds this court of Lewis Carroll's Humpty Dumpty who said "[W]hen I use a word it means just what I choose it to mean, neither more nor less."

In addition to finding an error of law this court also finds the action of the District Council arbitrary and capricious. Having ignored one remand there would seem to be little hope that it will take seriously the second. In fact, undaunted by any interpretations not to its liking, the District Council has proposed an amendment to section 27-406(h) of the Zoning Ordinance that would memorialize this interpretation. The court has given some thought to reversing the District Council outright as suggested by the applicant but is constrained not to do so. The court was persuaded by the argument of counsel for the opposition homeowners. At oral argument they conceded the District Council's error of law and suggested another remand. There may be some merit to counsel's contention that

the record showed the recent approval of another rubble fill approximately 1½ miles away and an increase of heavy truck traffic different from that which would be generated from any other side. Although the District Council made a passing reference to these matters it provided no meaningful discussion of them in its resolution for the court to review. Judicial review of an administrative agency at this level is not appellate review. It is a review only of meaningful findings and conclusions of the administrative body and does not call for reviewing the transcript of the proceedings.

Accordingly, this case is remanded once again for further proceedings before the District Council to consider whether the applicant's proposed rubble fill will alleviate some of the County's projected need using the standard set forth in the ordinance and advocated by counsel for the homeowners; namely whether the proposed rubble fill is necessary to serve county growth in light of other rubble fill applications approved or pending. Evidence shall be permitted on this issue alone and may also include evidence from the applicant, to the extent that it is able or chooses to do so, showing how county growth would fare without its landfill—a condition not yet contemplated by the current ordinance but apparently very much alive in the legislative minds of the District Council.

/s/ James J. Lombardi
JAMES J. LOMBARDI, Judge

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Date: 5-3-05

By: /s/ J. Hahn
J. HAHN

APPENDIX E

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

CAL 03-22303

MARYLAND RECLAMATION, LLC,
Plaintiff,

v.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY,
MARYLAND, SITTING AS THE DISTRICT COUNCIL,
Defendant.

REMAND ORDER

The Court having heard oral argument from the parties, and requiring additional explanation from the District Council of the meaning and application in this case of the "necessary to serve the projected growth" requirement in § 27-406(h) of the Zoning Ordinance, it is, this 21st of July, 2004, by the Circuit Court for Prince George's County, Maryland:

ORDERED, that this case is hereby REMANDED, without affirmance or reversal, to the County Council of Prince George's County; Maryland, sitting as the District Council; and it is

FURTHER ORDERED, that the District Council set this case for oral argument, with notice to all parties now before the Court, and hear argument from the parties, with no submissions of additional evidence, solely on the issue of necessity under § 27-406(h), and no other issue; and it is

FURTHER ORDERED, that the District Council adopt a new order on the necessity issue, explaining the meaning and

application in this case of the "necessary to serve the projected growth" requirement in § 27-406(h), and file the order with the Court, as soon as practicable after the oral argument; and it is

FURTHER ORDERED, that after the Council files the order on the necessity issue, the parties shall have 30 days from the date of that filing to submit to the Court additional written argument on the issue, and the Court will thereafter advise the parties of the course of future proceedings.

/s/ James J. Lombardi, Judge
JAMES J. LOMBARDI
Circuit Court for Prince George's County

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/s/ Jean Hahn 7-21-04
JEAN HAHN, Administrative Assistant

APPENDIX F

DR-2 COUNTY COUNCIL OF
PRINCE GEORGE'S COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL

Legislative Session: 1992
Bill No.: CB-85-1992
Chapter No.: 73
Proposed and Presented by: Council Member Wineland
Introduced by: Council Member Wineland
Co-Sponsors:
Date of Introduction: October 20, 1992

ZONING BILL

AN ORDINANCE concerning:

Special Exceptions for Rubble Fills

FOR the purpose of requiring that an analysis of need be included in the approval of a Special Exception for a Rubble Fill.

BY repealing and reenacting with amendments:

Section 27-406

The Zoning Ordinance of Prince George's County, Maryland, being also:

SUBTITLE 27. ZONING.
The Prince George's County Code
(1991 Edition).

SECTION 1. BE IT ENACTED by the County Council of Prince George's County, Maryland, sitting as the District Council for that part of the Maryland-Washington Regional District in Prince George's County, Maryland, that Section 27-406 of the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of the Prince George's

County Code, be and the same is hereby repealed and re-enacted with the following amendments:

SUBTITLE 27. ZONING.

PART 4. SPECIAL EXCEPTIONS.

DIVISION 3. ADDITIONAL REQUIREMENTS FOR SPECIFIC SPECIAL EXCEPTIONS.

Sec. 27-406. Sanitary landfill; rubble fill.

(a) A sanitary landfill or rubble fill may be permitted as a temporary Special Exception.

(b) The District Council shall determine the period of time for which the Special Exception is valid.

(c) In the R-E Zone, the landfill is only allowed if the neighborhood is substantially undeveloped and the landfill is an extension of an existing sanitary landfill on abutting land for which the approved Special Exception has not expired. This is not an amendment to an approved Special Exception under Subdivision 10 of Division 1, above.

(d) An application for a sanitary landfill or rubble fill that includes a "rock crusher" on the site must show the location of the proposed "rock crusher" on the site plan.

(e) The Technical Staff Report prepared in response to the application shall include a current, Countywide inventory of the locations, dates of approval, and conditions of approval concerning haul routes and estimated loads per day for all approved and pending Special Exceptions for sand and gravel wet-processing, sanitary landfills and rubble fills, and surface mining, as indicated by the record in the case. The inventory shall also include the locations of all nonconforming sand and gravel wet-processing, sanitary landfills and rubble fills, and surface mining operations throughout the County that were certified after September 6, 1974.

(f) In reviewing the application for compliance with the required findings set forth in Sections 27-317(a)(4) and 27-317 (a)(5), the District Council shall consider the inventory, required in Section 27-406(e).

(g) The Technical Staff Report prepared in response to an application for a rubble fill shall include an analysis of need based on the most current available projections of residential and employment growth in Prince George's County over a fifteen-year period. The District Council shall consider this analysis when determining compliance with the finding required in time for which the Special Exception is valid.

(h) When approving a Special Exception for a rubble fill, the District Council shall find that the proposed use is necessary to serve the projected growth in Prince George's County.

SECTION 2. BE IT FURTHER ENACTED that this Ordinance shall take effect on December 31, 1992.

Adopted this 17th day of November, 1992.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PART OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

BY:

Richard J. Castaldi
Chairman

ATTEST:

_____

Joyce T. Sweeney.
Acting Clerk of the Council

KEY:

Underscoring indicates language added to existing law.

[Brackets] indicate language deleted from existing law.

Asterisks *** indicate intervening existing Code provisions that remain unchanged.

AGENDA ITEM SUMMARY
PRINCE GEORGE'S COUNTY COUNCIL

Reference No: CB-85-1992
Draft No: 2
Meeting Date: 11/17/92
Requester: WI

Item Title: An Ordinance for the purpose of requiring that an analysis of need be included in the approval of a Special Exception for a rubble fill

Sponsors WI

Date Presented 9/22/92
Committee Referral (1) 9/22/92 P&Z
Committee Action (1) 10/14/92 FAV(A)
Date Introduced 10/20/92
Pub. Hearing Date (1) 11/17/92 1:30 PM
Executive Action __/__/__
Effective Date12/31/92

Council Action (1) 11/17/92 Enacted
Council Votes CA: A_, B_: A_, C_: A_, D_: A_, F_: A_, MC: A_, M_: A_, P_: A_, WI: A_

Pass/Fail P

Remarks

Drafter: Mary Lane, Director
Planning & Zoning Com.

Resource Personnel:

LEGISLATIVE HISTORY

PLANNING AND ZONING COMMITTEE REPORT

DATE: 10/14/92

Committee Vote: Favorable as amended, 5-0 (In favor: Council Members Casula, Del Giudice, Fletcher, Mills and Wineland).

Staff explained that this legislation is intended to ensure that the rubble fills approved in Prince George's County are necessary to serve the needs of this County, and not the needs of the entire region. The sponsor added that since Federal law prohibits the County from restricting the use of privately-owned rubble fills, requiring a needs analysis prior to Special Exception approval will help preserve this resource and protect the citizens of the County.

Gene Lauer, the Director of DER, expressed concern that limiting the number of rubble fills would not prevent out-of-County trucks from using the fill, and the capacity of the fills would simply be depleted sooner. He also requested that the timeframe for analysis be increased from ten years to twenty years. The Committee agreed to fifteen years.

The Municipal Association supports the legislation, and the Legislative Officer found it to be in proper legislative form. The Planning Board supports the legislation, with an amendment to require the applicant, rather than the Technical Staff, to prepare the needs analysis. This amendment was rejected by the Committee.

BACKGROUND INFORMATION/FISCAL IMPACT

(Includes reason for proposal, as well as any unique statutory requirements)

There are certain Special Exception uses, including gas stations and planned retirement communities, for which a finding of need within a particular service area must be made.

This legislation requires a similar finding for the approval of rubble fills. Specifically, an analysis of need based on projected growth in the County must be included in the Technical Staff Report, and the District Council must use this information, to determine whether the proposed use is necessary to serve the needs of Prince George's County.

CODE INDEX TOPICS:

Zoning
Special Exceptions
Additional Requirements for Specific Special Exceptions
Sanitary landfill; rubble fill 27-406